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No. 90-1059

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—against—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH and ANGELO PETROMELIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does New York Executive Law § 632-a violate the First Amendment to the U.S. Constitution because it requires the media to turn over to the State the profits owed to a criminal who tells the story of his crime, to allow the victims of that crime to recover for their injuries?

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INTRODUCTION

This is an appeal by petitioner, the publisher of the book *Wiseguy*, from a judgment of the United States Court of Appeals for the Second Circuit (54a)[1] which affirmed a judgment of the District Court for the Southern District of New York. The Second Circuit declared New York Executive Law ("Exec. Law") § 632-a, which provides crime victims with a meaningful opportunity to be compensated for their injuries when a criminal is paid for discussing or reenacting his or her

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1 ("____ a") refers to the Appendix to the Petition.

crime in the media, to be constitutional under the First and Fourteenth Amendments to the U.S. Constitution. (1a-26a). The Second Circuit majority held that the statute directly implicates the First Amendment and that it is both necessary and narrowly tailored to achieve its purpose.

STATEMENT OF THE CASE

A. Executive Law § 632-a

New York has long recognized the common law maxim that no person "shall be permitted . . . to take advantage of his own wrong. . . ." *Riggs v. Palmer*, 115 N.Y. 506, 511-512, 22 N.E. 188, 190 (1889). In 1977, New York enacted a statute, Exec. Law § 632-a, which applies this maxim to criminals who seek to profit from selling the story of their crime. New York's statute was passed after it was reported that a serial murderer, known as Son of Sam, was being offered large sums of money for selling the rights to his story.[2]

Exec. Law § 632-a requires that any entity that contracts with a criminal[3] regarding the reenactment or discussion of the crime turn over to the New York State Crime Victims Board ("the Board") the money owing to the criminal under the contract. The Board then holds the money in an escrow account for five years and, during that time, the crime victim

2 "McGraw-Hill Book Company later bought the rights to [David] Berkowitz's [Son of Sam's] story in a deal that included a $250,000 advance, $150,000 profit to the ghost writer, and $75,000 to Berkowitz through his court-appointed conservator Doris Johnsen." Okuda, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 Calif. L. Rev. 1353, 1354 (1988) (footnote omitted) ("Okuda, *Criminal Antiprofit Laws*"). The book *Son of Sam*, authored by L.D. Klausner, was published in 1981. *See In re Johnsen*, 103 Misc.2d 823, 430 N.Y.S.2d 904 (Sup. Ct. Kings Co. 1979).

3 The statute applies to persons accused or convicted of a crime committed in New York as well as to persons who admit committing a crime. Exec. Law §§ 632-a(1), (10)(b) (55a, 57a). However, once the charges against an accused person are dismissed or if there is an acquittal, that person is entitled to have all money given to the Board returned. Exec. Law § 632-a(3) (56a).

or the crime victim's estate can bring a civil lawsuit against the criminal. The lawsuit is not barred by the expiration of the regular statute of limitations for a tort action, which in New York is one or three years for personal injury actions, New York Civil Practice Law & Rules ("CPLR") §§ 214(5), 215(3) and 215(8), and two years for wrongful death actions, Estates, Powers & Trusts Law ("EPTL") § 5-4.1. Section 632-a creates a new *in rem* cause of action with its own five year statute of limitations which commences when the escrow account is established. Exec. Law § 632-a(7) (56a). *See Barrett v. Wojtowicz*, 66 A.D.2d 604, 414 N.Y.S.2d 350 (2d Dept. 1979) (upholding statute of limitations provision). The Board is required to publicize in newspapers of general circulation the availability of the money in the escrow account to satisfy judgments obtained by victims of the crime (Exec. Law § 632-a(2) [55a]), and then to satisfy any judgments out of the escrow account. Exec. Law § 632-a(1) (55a). The criminal receives all money remaining in the escrow account after five years or after all victims' judgments have been satisfied. Exec. Law § 632-a(4), (11)(e) (56a, 57a-58a).

New York's anti-profit statute is a response to the plight of victims of publicized crimes. Most crime victims will not bring a civil action against a criminal because the criminal usually has no assets.[4] A criminal may profit considerably from a book or movie about the crime and these profits may be acquired after the regular statute of limitations has run.[5]

4 "Ninety percent of convicted criminals have annual incomes of less than $5000 at the time of arrest. Over half of all convicted felons are unemployed at the time of arrest." R. Reiff, *The Invisible Victim: The Criminal Justice System's Forgotten Responsibility*, 137 (1979). "Of those [criminals] who are apprehended, few are of legal age to be subject to [a civil] action or have the resources to pay for the costs of the damages they have inflicted." R. Meiners, *Victim Compensation*, 3 (1978).

5 *See* Comment, *In Cold Type: Statutory Approaches To The Problem Of The Offender As Author* ["Comment, *In Cold Type*"], 71 J. Crim. L. & Criminology 255, 267 (1980) (discussing criminals' cooperation in 1977 book and 1978 film concerning $1.5 million robbery of the Boston office of Brink's Inc. that took place in 1950).

In addition, unless the victim can succeed in attaching the criminal's profits from a book or movie before obtaining a civil judgment, the assets may be dissipated.[6] Therefore, without the New York anti-profit law, a criminal could be paid a large sum of money for selling the story of his crime while his or her victims would be left without any meaningful remedy. As the New York courts have recognized:

> Clearly, it is not for lack of merit that the victim of a crime does not at once sue for the tortious injury. In fact the criminal conviction would be conclusive proof of most of the elements necessary to recover on an analogous claim in tort. The obvious reason that a victim ordinarily withholds suit is that he believes that the defendant is indigent, so that the expenditure of the time and money involved in a civil litigation would be of no avail. . . . It would be ironic to hold that a victim who may have been killed, maimed or otherwise injured is to be left remediless while the felon could reap the 'fall-out' rewards of the victim's injuries.

Barrett v. Wojtowicz, 66 A.D.2d at 614-15, 414 N.Y.S.2d at 356-357.

While the statute protects profits for the sake of victims, it does not prohibit a criminal from speaking about his crime nor does it prohibit a publisher from publishing the criminal's reenactment or discussion of the crime. The statute is directed only at the money to be paid the criminal and not at his expression.[7]

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6 Avoiding dissipation of the criminal's profit is an important component of anti-profit laws. Virtually all of the other states' laws contain a provision, similar to Exec. Law § 632-a(9), which prohibits any action taken by a criminal "by way of execution of a power of attorney, creation of corporate entities or otherwise" that defeats the purpose of the statute. *See generally*, Note, *Alabama's Anti-Profit Statute: A Recent Trend in Victim Compensation*, 33 Ala. L. Rev. 109, 114 and n.23 (1981).

7 "The antiprofit law simply implements a special procedure for preserving a victim's cause of action against a criminal until the criminal has an asset from which to collect a judgment. Since the criminal's story rights are one of her more valuable assets, targeting that asset for the victim's recovery is an effective means of ensuring that the victim will be compensated." Okuda, *Criminal Antiprofit Laws* at 1367.

Although the statute may create a disincentive for some criminals to speak because they are not guaranteed immediate payment of all of their profits, New York's anti-profit statute contains a number of provisions which would encourage criminals to tell their story. First, the statute allows the criminal to receive a portion of the escrowed money to pay legal fees in his criminal proceedings, thereby permitting him, if he has no other assets, to obtain private counsel. Exec. Law § 632-a(8) (56a-57a).[8] Second, a representative of the criminal, such as a literary agent, may seek his fee in assisting the criminal to produce the work. *Id.* The escrow account may be used for these two purposes for up to twenty percent of the money in the account. *Id.* Third, the criminal is entitled to all money remaining in the escrow account after victims' judgments, and any judgments from other creditors (who are not entitled to the extended statute of limitations provision), are satisfied. Exec. Law §§ 632-a(4), (11)(e) (56a, 57a-58a). Fourth, the criminal who wishes to financially repay his victims for their injuries and suffering can assist in that endeavor because, under the statute, the victim's judgment takes priority over the outstanding judgments of other creditors, including state and local government tax authorities. Exec. Law § 632-a(11)(c), (d) (57a-58a).[9] Finally, the person

8 "A criminal may also enter a media contract to raise money for her most pressing need, her criminal defense." Okuda, *Criminal Antiprofit Laws* at 1365. "Experience shows that offenders will contract for their stories in order to pay legal fees. In all of the reported cases of offenders selling or assigning the rights to the story of their crimes, the proceeds were applied in whole or in part to the payment of legal fees." Comment, *In Cold Type* at 260 (footnote omitted).

9 For example, "Gary Gilmore requested several times before he was executed that a portion of the proceeds from any stories about his life and crime be distributed to the families of his victims." Okuda, *Criminal Antiprofit Laws* at 1364 n.74 (citation omitted). See also "2 Murder Victims Had Much In Common," N.Y. Times, Jan. 18, 1977, at 21, col. 4.

accused of a crime is entitled to have all money returned if he is acquitted or the charges are dismissed. Exec. Law § 632-a(3) (56a). As one commentator has noted:

> In fact, criminals, like other speakers, have motivations for speaking besides pecuniary gain, and there is some evidence that criminals are willing to share their stories for no compensation at all. Sometimes, for example, criminals actually desire to compensate their victims. In such cases, antiprofit laws would encourage speech rather than deter it. Criminals may also be motivated to speak by a desire to publicize their side of the story, retrying the case they had lost [in the court of law] in the court of public opinion.

Okuda, *Criminal Antiprofit Laws* at 1364-1365 (footnotes omitted); *see also* Comment, *In Cold Type* at 260 (discussing incentives to speak in New York's statute).

B. Legislative History Of Executive Law § 632-a

The statute was enacted to ensure that the victim's right to compensation is protected whenever the criminal attempts to profit from discussing or reenacting the crime. As the author of the bill stated:

> It is abhorrent to one's sense of justice and decency that an individual, such as the forty-four caliber killer, can expect to receive large sums of money for his story once he is captured—while five people are dead, other people were injured as a result of his conduct. This bill would make it clear that in all criminal situations, the *victim must be more important than the criminal.*

Memorandum of Senator Emanuel R. Gold, *reprinted in* 1977 New York State Legislative Annual 267 (emphasis supplied).[10]

10 *See* "Criminals' Revenues from Stories Curbed", N.Y. Times, Aug. 13, 1977, at 20, col. 3 (sponsor of the New York bill stated that "he developed the bill after reading a newspaper account during the hunt

The legislative history makes clear that the overriding purpose of the bill is to protect the rights of victims of publicized crimes to receive compensation *before* the criminal is paid for telling the story of his crime.

> Currently a person may commit a crime causing much damage and personal injury, and then gain substantial financial benefits related to resulting publicity. *This bill will ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.* The requirement of a civil action will prevent the abuse of this privilege.

See Assembly Bill Memorandum Re: A 9019, July 15, 1977, *reprinted in* Legislative Bill Jacket, N.Y. Laws of 1977, ch. 823 (emphasis supplied). (14a)

The bill received widespread support throughout New York's criminal justice community. For example, the Director of the Division of Criminal Justice Services wrote to the Governor's counsel:

> Though hardly a new phenomenon, there has been a recent realization by the general public that where a defendant is a well-known personality or the crime with which he is charged is one that has aroused a high degree of public interest, he is in a position to make a considerable amount of money from articles, books or television accounts of his life, times and crimes. . . .
>
> . . . *this bill* takes cognizance of the situation and *seeks to redirect the money flow from the criminal to his victims.* As an expression of the concept of simple justice it

for the 'Son of Sam' stating that the killer 'stood to get rich' and that there would be people 'waiting at the precinct house, to get him to sign a contract' "; *see also* Winfrey, " *'Son of Sam' Case Poses Thorny Issues for Press*", N.Y. Times, Aug. 22, 1977, at 1, col. 1 (discussing ethical problems posed for press by coverage of killings and alleged $50,000 to $100,000 requested for taped interview with Berkowitz).

> cannot be faulted. It is merely another facet of the oft-repeated maxim that crime does not (or should not) pay.

See Memorandum from Robert Schlanger, Division of Criminal Justice Services, to Judah Gribetz, dated August 3, 1977, *reprinted in* Legislative Bill Jacket, N.Y. Laws of 1977, ch. 823 (emphasis supplied). (14a-15a)

The statute has been amended three times to strengthen its scope and coverage "to extend and protect the victim's rights" (Memorandum of Senator Emanuel R. Gold, *reprinted in* 1978 New York State Legislative Annual 243), and "to ensure that the original legislative intent of preserving . . . moneys for recovery by the victims of the crime can be effectively implemented." Memorandum of Senator Ralph J. Marino, *reprinted in* 1981 New York State Legislative Annual 247.

In the past 14 years, almost 40 states and the federal government have enacted statutes modeled after New York's law.[11] However, a number of the states' anti-profit laws go beyond the specific and narrow objective of New York's statute, and have as one of their objectives the forfeiture of the criminal's profits.[12]

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11 *See* 59a-60a. "Particularly notorious crimes seem to have prompted anti-profit legislation in other states as well." Okuda, *Criminal Anti-profit Laws* at 1355 (footnote omitted).

12 At least 15 states provide that the remainder of the escrow money shall be paid to the State and not to the criminal. *See, e.g.*, Ala. Code § 41-9-82 (1982); Alaska Stat. 12.61.020(a) (1989); Ariz Rev. Stat. Ann. § 13-4202E (1989); Ark. Code Ann. § 16-90-308(c)(2) (1987); Conn. Gen. Stat. Ann. § 54-218(b) (West 1985); Ind. Code Ann. § 16-7-3.7-5 (Burns 1983); Kan. Stat. Ann. § 74-7320(5) (Supp. 1989); La. Rev. Stat. Ann. § 46:1835(B) (West 1982); Miss. Code Ann. § 99-38-9(3) (Supp. 1990); Mo. Ann. Stat. § 595.045(11) (Vernon 1991); Mont. Code Ann. § 53-9-104(1)(d) (1989); N.J. Stat. Ann. § 52:4B-30(a)(5) (West 1986); Okla. Stat. Ann. tit. 22, § 17(C) (1991); Or. Rev. Stat. § 147.275 (1989); Wyo. Stat. § 1-40-112(b) (1988). *See also* 18 U.S.C.A. § 3681(c)(2) (West 1985 & Supp.).

C. Executive Law § 632-a And Wiseguy

In September, 1981, Simon & Schuster entered into a publishing agreement to pay money to Henry Hill, a person who had admitted to federal authorities committing various crimes (and had been placed in the Federal Witness Protection Program in exchange for his agreement to cooperate) and to Nicholas Pileggi, a writer and reporter, for a work to be written by Pileggi about Hill's life, entitled *Wiseguy*. In turn, Hill and Pileggi sold exclusive publishing rights to Simon & Schuster for *Wiseguy*. (47a-48a)

Wiseguy: *Life In A Mafia Family*, was published in 1985. The story dates from 1955 when, at the age of eleven, Hill became involved in organized crime. In *Wiseguy*, Hill describes in great detail "countless . . . infamous crimes" (CA. App. 10)[13] he committed as well as those he helped others to commit. (48a)

In January, 1986, the Board learned for the first time of the contract between Simon & Schuster and Hill for the publication of *Wiseguy*. (48a) After reviewing the contract and *Wiseguy*, the Board issued a Proposed Determination and Order on May 27, 1987, finding that the contract and book are covered by Exec. Law § 632-a because *Wiseguy* contains Hill's admission to involvement in various crimes as well as Hill's discussion of those crimes. (50a) The Board determined that all money paid to Hill under the contract must be turned over to the Board to be held in escrow for the victims of crimes committed by Hill. (50a) One victim of Hill's crimes has already come forward to advise the Board that she intends to bring a civil suit against Hill based upon the murder of her husband, William Bentvana, a/k/a Billy Batts. (CA. App. 258)

Hill was also ordered to turn over to the Board the money already paid to him under the contract ($96,250 less any agent fees) and Simon & Schuster was ordered, in the event Hill failed to return the money, to turn over the money it

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13 ("CA. App.") refers to the joint appendix in the United States Court of Appeals for the Second Circuit.

wrongfully distributed to Hill. (51a-52a) Nicholas Pileggi was determined to be a co-author and not a representative of Hill, and, therefore, he was entitled to retain all of the proceeds due him under the contract. (50a)

All parties had thirty days to request a hearing and to submit objections to the Proposed Determination and Order. (46a) Simon & Schuster and Hill did not object. The only party to object was Hill's literary agent, who sought, pursuant to Exec. Law § 632-(a)(8) (56a-57a), to retain his ten percent literary fee as provided for in the contract. On October 19, 1988, the Board issued its Final Determination and Order and granted the literary agent's application. The Board's determination with respect to Simon & Schuster and Hill became final at that time.

D. District Court Proceedings

Petitioner commenced this action on August 3, 1987 seeking declaratory and injunctive relief with respect to the statute (CA. App. 3-5).[14] In the District Court, petitioner submitted affidavits in support of its summary judgment motion, all purporting to demonstrate that Exec. Law § 632-a restricts the common industry practice of directly compensat-

14 The present case is the only federal court challenge to the validity of an anti-profit statute under the First Amendment. The other cases to directly address the First Amendment issue have been brought in state court and in all of these cases, the statutes at issue were upheld. The cases in New York include *Children of Bedford, Inc. v. Petromelis* ["Children of Bedford"], 143 Misc.2d 999, 541 N.Y.S.2d 894 (Sup. Ct. N.Y. Co. 1989), *aff'd on opn. below*, _____ A.D.2d _____, 556 N.Y.S.2d 483 (1st Dept. 1990), *appl. pendg.* (Ct. of Appeals) (Jean Harris's book *Stranger In Two Worlds*); *St. Martin's Press v. Zwiebel*, No. 89/12273 (Sup. Ct. N.Y. Co. Feb. 11, 1990), N.Y.L.J. Feb. 26, 1990, p. 25, col. 1 (R. Foster Winan's book *Trading Secrets*). The only case outside New York in which the validity of an anti-profit law under the First Amendment was addressed was in New Jersey where the statute was upheld by the lower court, but an appellate court reversed the lower court's decision on statutory grounds and did not decide the constitutional issue. *Fasching v. Kallinger*, No. L-069197-83 (N.J. Super. Ct. Law Div. July 24, 1985), *rev'd on other grounds*, 211 N.J. Super. 26, 44, 510 A.2d 694, 696, 702-704 (Super. Ct. App. Div. 1986).

ing criminals who serve as primary sources or authors and thereby discourages publication. (CA. App. 73-191.) The affiants, however, did not point to any particular criminals or projects that they had in fact declined to pursue due to § 632-a. (CA. App. 86-87, 125-126.) Hill did not submit an affidavit and no other criminal stated that the statute had caused him or her not to speak about his or her crime or to write or cooperate in a book about it.[15]

In their cross-motion for summary judgment, respondents pointed out that the statute had not inhibited the publication of *Wiseguy*. The Board also stated that in 1988, it was considering at various administrative stages, ten cases in which publishing, film or television contracts had been entered into with criminals for the story of their crimes, including contracts with R. Foster Winans (*Trading Secrets*), Mark David Chapman (People Magazine article "The Man Who Shot John Lennon"); and Michelle Sindona (*Power on Earth* [by Nick Tosches]). (CA. App. 347-348) At that time, the Board also was investigating some ten other cases in which a criminal or his representative may have received money for his crime story. (CA. App. 348)[16]

In its decision dated October 24, 1989, the District Court found that Exec. Law § 632-a had an incidental effect on speech activities. The court reasoned: "Although it applies only to contracts with respect to the expression of the crimi-

15 Nicholas Pileggi, the author of *Wiseguy*, noted that he had not pursued three projects because the statute would not allow his sources to be paid immediately. (CA. App. 95) The record does not disclose whether those sources declined to cooperate with Pileggi because of the statute. Pileggi also stated that in his view, Hill would not have cooperated with him on *Wiseguy* if he was not going to be paid at all. (CA. App. 93)

16 *See also* Okuda, *Criminal Antiprofit Laws* at 1364 and n.71 (discussing books written and published in New York since Section 632-a was enacted); Note, *Publication Rights Agreements In Sensational Criminal Cases: A Response To The Problem*, 68 Cornell L. Rev. 686 n.2, 687 n.4 (1983) (discussing books, articles and movies in which publishers paid large sums of money to criminals to acquire publication rights to their criminal story).

nal's feelings about or recollection of his or her crime, the statute's reach is not prohibitive of the expressive activity. The effect is limited to the nonexpressive element of the activity: receiving a profit." (38a) The District Court then upheld the statute under the test for incidental limitations on First Amendment freedoms set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). Applying that test, the District Court determined that New York's interest in victim compensation is an important one, that the interest is unrelated to freedom of expression and that any restriction on speech is no greater than is essential to promote the government's interest because the statute "is drawn . . . to garnish the proceeds so that they will be used in a productive manner [and t]he statute reaches only proceeds from expressive activity for the purpose of preventing a criminal from directly profiting from his or her crime."[17] (41a-42a)

E. Court of Appeals Decision

The Second Circuit (one judge dissenting) affirmed the District Court's judgment but on different grounds. The Court of Appeals reasoned that "the statute burdens directly the speech of those who wish to tell (and sell) the stories of their crimes" because "[w]ithout a financial incentive to relate their criminal activities, most would-be storytellers will decline to speak or write." (11a) The majority also found that the statute singles out the media for differential treatment based on expressive content. (12a-13a) Accordingly, the court decided that to withstand this First Amendment challenge, Section 632-a must survive strict scrutiny, i.e., " 'the State . . . must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983)." (12a-13a)

17 The District Court also rejected petitioner's contention that the statute violates the due process clause because it is overbroad and vague. (42a-44a) Petitioner abandoned this claim in its appeal to the Second Circuit. (10a)

The court then determined that the State had met its burden of showing that Exec. Law § 632-a is necessary to serve a compelling state interest and is narrowly tailored to achieve that interest. The majority found that New York has a compelling interest "in assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation by reason of their victimization. . . . Our society rightly deems it fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim remains uncompensated for financial loss occasioned by the crime." (13a-14a) The court reasoned that the statute is necessary to serve that interest because it "assure[s] that funds are set aside out of profits derived by criminals from the exploitation of their crimes and made available for the payment of judgments later recovered by the victims of the crimes exploited." (15a)

Finally, the court determined that the statute recognizes that the only way a criminal can profit from a specific crime involving a specific victim, apart from obtaining any proceeds of the crime itself, is to tell (and sell) the story of the crime and that the sole asset of most criminals is the right to tell the story of their crimes. (15a) Therefore, the statute narrowly serves the state's compelling interest because the specialized attachment mechanism in Exec. Law § 632-a "is designed to freeze the proceeds of storytelling by criminals for the benefit of those whose misfortunes gave rise to the story." (16a)

The dissenting judge agreed that the statute should be held to a standard of strict scrutiny review. However, he concluded that the state's interest in victim compensation was not served by the statute in a manner narrowly tailored to achieve that end because, in his view, the statute was both under and over-inclusive. (21a-25a)

REASONS FOR DENYING THE WRIT

A. The Court of Appeals Decision Does Not Conflict With Any Decision Of This Court

Petitioner first claims that this Court should grant review because there allegedly is a conflict between the Second Circuit's decision and other First Amendment decisions of this Court. (Petition, pp. 10-16). The lower court's application of strict scrutiny to this unique statute is based on settled principles of law and does not conflict with any decision of this Court.[18] The majority's application of the strict scrutiny test is, however, a narrow one. That holding is limited to the specific state interest furthered by § 632-a and the ends the statute seeks to achieve.

In applying the strict scrutiny test, the Second Circuit first determined that New York has a compelling interest in preventing the unjust enrichment of criminals at the expense of their victims. The legislative history of the statute and New York's public policy support that determination. Society's sense of fairness is offended when a criminal seeks to profit by capitalizing on his criminal activity in the media while his victims remain uncompensated for their injuries. Moreover, reenactment or other depiction of the crime in the media often causes additional suffering to victims and their families. The Legislature must be permitted to take account of that inequity and suffering in fashioning a victim compensation remedy that ensures victims a meaningful opportunity to be compensated. As one commentator has aptly stated:

> The . . . antiprofit legislation thus presents a sound solution to the unequal rewards given the criminal by our mass-media society. Victimized once at the hands of the wrongdoer, the victim should not be victimized again by the financial rewards paid to the criminal for the

18 Similarly, all of the New York courts which have addressed the validity of Section 632-a under the First Amendment have upheld the statute. See n.14 *infra*. The N.Y. Court of Appeals is scheduled to hear argument in the *Children of Bedford* case on March 26, 1991.

> story of his crime. As the price for crime stories has risen, those who have paid the most—the victims—are finally compensated for their unwanted role in the criminal's story.

Okuda, *Criminal Antiprofit Laws* at 1375.

Petitioner can point to no decision of this Court which suggests that New York's interest in ensuring that criminals do not profit from their crimes at the expense of their victims is not compelling. *Cf. Caplin & Drysdale Chartered v. United States*, 109 S. Ct. 2646, 2654 (1989) (governmental interest in depriving criminals of economic powers derived from their criminal activity); *Landau v. Vallen*, 895 F.2d 888, 891 (2d Cir. 1990) ("All things being equal, we believe courts in the civil context should be particularly sensitive to the rights of the victims of crimes when they seek compensation from those accused of inflicting their injuries.") However, petitioner argues that the Second Circuit committed error because it identified the compelling state interest so narrowly that the statute would necessarily serve that interest. (Petition, p. 13). To the contrary, New York's interest is not to compensate the broad class of crime victims: rather, Section 632-a was enacted to benefit a special category of victims, i.e., the victims of those criminals who seek to profit by telling the story of their crime.[19]

The Court of Appeals' further conclusion that the statute is necessary to serve the state's compelling interest and is narrowly tailored to achieve that interest (15a-16a) also has no

19 *See also* Comment, *In Cold Type* at 268 ("The objectives of section 632-a differ from the general crime victims compensation scheme. Instead of compensating all victims for their injuries, the statute is limited to those cases in which the offender would be unjustifiably enriched as a result of the crime in which the victim was injured. . . . The victim is allowed to raise his claims to the escrow account, not out of legislative grace as in the case of the compensation monies, but through an equitable right to them as the victim of the crime which generated them. In this way, the statute is concerned with the special nature of the funds being attached rather than the needs of victims in general." (footnote omitted)

application beyond the record in this case because it was based upon factors particular to New York's statutory scheme.

First, the statute is necessary to serve the state's compelling interest because it provides the most effective means of ensuring that crime victims are compensated when the criminal is paid for telling the story of the crime. The statute creates a separate cause of action and a five year statute of limitations which does not begin to run until an escrow account is established. These provisions ensure that a victim whose right to commence a tort action has expired under New York's general statute of limitations will be able to bring a civil action against the criminal under § 632-a (although satisfaction of his or her judgment is limited to the money in the escrow account). The statute also ensures that the money is paid into the escrow account and is not dissipated while the victim pursues his or her remedy. Victims are more likely to bring civil actions against criminals and, if they obtain a judgment, receive compensation, if they are assured that the criminal has assets which will not be dissipated in the time it takes to obtain and then satisfy a money judgment. The current provisions of the New York CPLR, Article 62, regarding judgment creditors, do not provide the same protections for victims as does the attachment feature of Exec. Law § 632-a, i.e., the requirement that the Board hold all money until all victims' judgments have been satisfied. As the Court of Appeals stated, New York's general provision for attachment under Article 62 of the CPLR is "too limited to fulfill the State's interest in seeing that victims are the first to be compensated from the proceeds of crime story exploitation. . . . Recovery by many crime victims would be rendered impossible if attachment were limited to [article 62]." (16a)

Second, the statute is narrowly tailored to achieve New York's compelling interest because it targets only the criminal's profit. Criminals remain free to discuss the crime or anything else they wish. The statute does not forbid them from speaking. In addition, the statute targets only the criminal's decision to profit by capitalizing on the publicity of his

or her crime. If the criminal chooses to speak publicly about his or her crime and gets paid for doing so, the victims of that crime are assured a meaningful opportunity to obtain compensation. As the Second Circuit recognized, "the sole asset of most criminals is the right to tell the story of their crimes" and "the only way a criminal can profit directly from a specific crime involving a particular victim . . . is by writing or talking about it or reenacting it." (15a) *See also Children of Bedford*, 143 Misc.2d at 1007, 541 N.Y.S.2d at 900 ("as a practical matter, most criminals will possess no other source of income.")

The Second Circuit's application of the strict scrutiny standard is clearly distinguishable from other decisions of this Court, cited by petitioner, where a compelling state interest was found *not* to be necessary or narrowly tailored to achieve the State's objectives. *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) (State has a compelling interest in raising revenue, but that interest does not justify special use tax on the press); *Carey v. Brown*, 447 U.S. 455 (1980) (State has an important interest in preserving residential privacy, but that interest does not justify exemption for peaceful picketing of a place of employment involved in a labor dispute). In these cases, the distinctions drawn by the statute were not based upon a compelling state interest nor were such distinctions necessary to serve the interest posited by the state. In short, there was not a sufficient fit between the state's compelling interest and the means employed to satisfy it. *See Board of Trustees of the State University of New York v. Fox*, ____ U.S. ____, 109 S. Ct. 3028, 3033, 3035 (1989). As demonstrated above, the lower court properly applied strict scrutiny here based upon a substantial record supporting New York's compelling interest in ensuring that criminals not profit at the expense of their victims and the statute is narrowly drawn to achieve that specific objective.

Because the statute can be sustained under the factors set forth in *United States v. O'Brien*, it is also unnecessary for this Court to review the decision below to address the Court

of Appeals' application of strict scrutiny. The New York State courts have upheld Section 632-a as an incidental infringement on First Amendment rights which "is no greater than is essential to the furtherance of [a substantial State interest]. *United States v. O'Brien*, 391 U.S. 367, 377 (1968)." *Children of Bedford*, 143 Misc.2d at 1006-7, 541 N.Y.S.2d at 900.

The *O'Brien* standard applies here because Section 632-a is directed only at the criminal's profits in order to aid victim compensation, and not at any expressive conduct. The statute does not impose an affirmative barrier which prevents the criminal from speaking or from disseminating his message but may affect only his willingness to speak because he is not guaranteed full and immediate payment. It is well-established that "[f]reedom of speech presupposes a willing speaker." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). If the only deterrence to speech is the loss of remuneration, the speaker cannot be considered a "willing speaker," that is, one who wishes to but is being prevented from expressing his thoughts and feelings. *See also Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-706 (1986) and *Branzburg v. Hayes*, 408 U.S. 665, 680 (1972) (First Amendment is not violated by a generally applicable statute directed toward nonexpressive conduct which may have the effect of restricting speech); *cf. Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. at 2654 (provision of the federal drug forfeiture statute does not violate the Fifth and Sixth Amendments. "If defendants have a right to spend forfeitable assets on attorney's fees, why not on the exercise of the right to speak, . . ?")

B. The Record Does Not Support Petitioner's Assertion That Unless The Decision Below Is Reviewed There Will Be A Significant Deterrent Effect On Publication Of Stories By Criminals

Petitioner's second reason for seeking review by this Court is based on its view that the New York statute "will deter protected speech in ways that will escape review." (Petition,

p. 16). Petitioner states that, as a result of Section 632-a, criminals will be deterred from seeking publishing contracts, publishers will be deterred from seeking out and pursuing some projects and writers and publishers will be pressured to delete any content that triggers the law's application. *Id.*

It is significant that petitioner's entire argument is premised on affidavits by several important people in the publishing industry as to how they have altered, or plan to alter, their behavior as a result of the statute, and speculation as to what books might never have been published had Section 632-a been in effect at the time of publication. The record is barren of any concrete examples from publishers or criminals that the statute has deterred them from speaking or from publishing, and the affiants' statements must, therefore, be considered conjectural. *See also* discussion above at p. 11 and n.15.

This Court has previously declined to find a First Amendment violation where the evidence suggesting that speech will be deterred was based primarily on speculation. In *Branzburg v. Hayes*, 408 U.S. at 693-94, this Court noted that the evidence presented concerning the deterrent effect of issuing subpoenas to reporters to appear before grand juries on the willingness of confidential sources to speak to reporters was "widely divergent and to a great extent speculative. It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of professional self-interest of the interviewees." *Id.* (footnotes omitted)

The same type of "widely divergent" views are presented here because the record demonstrates that books by criminals continue to be written and obviously some criminals will continue to speak regardless of the monetary disincentive contained in the statute. Moreover, the fact that there are monetary incentives to speak in the statute and that criminals have continued to write books about their crimes makes it unclear what the actual effect of the statute will be.

Even if petitioner could prove that some criminals may refuse to speak unless they are guaranteed immediate payment, proof of such deterrence does not, by itself, create an issue worthy of this Court's review. "[E]very civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for civil damages has less money to spend [on protected activities], yet no one would suggest that such liability gives rise to a First Amendment claim." *Arcara v. Cloud Books, Inc.*, 478 U.S. at 706.

Finally. petitioner argues that the statute will cause publishers to delete passages from works in order to avoid the statute's reach. (Petition, p. 18) However, Section 632-a does not require publishers to delete material about the crime in order to publish the book. Moreover, "[T]hat instances may be envisioned where a work should not be made subject to the provisions of the statute, such as where the crime is a minor offense or was committed by a youthful offender or in the remote past, does not render it constitutionally vague. . . . Petitioners may be assured 'that the New York courts will apply the statute consistently with the constitutional command'. . . ." *Children of Bedford*, 143 Misc.2d at 1008, 541 N.Y.S.2d at 900-901.[20]

In sum, petitioner's assertions that the statute will have the effect of deterring works from being published and that protected conduct will escape court review are both speculative.

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20 Subsequently, in *Application of Jean Harris v. Abate*, Index No. 89/24246 (Sup. Ct. N.Y. Co. March 23, 1990), N.Y.L.J. April 2, 1990, p. 25, col. 3, another New York court held that a magazine article by Jean Harris, titled "My Life In Prison" which contained a few sentences about the crime Ms. Harris was convicted of committing, was not subject to Section 632-a because the core of the article is about prison life and the sentences which refer to the crime are "merely incidental and *de minimis*. . . ." A New York court has also held, in quashing a subpoena issued by the Board, that the statute does not apply where a person pled guilty to a "victimless" crime. *Halmi v. New York State Crime Victims Board*, 12 Media L. Rep. (BNA) 2388 (Sup. Ct. N.Y. Co.), N.Y.L.J. June 5, 1986, p. 12, col. 3, *aff'd on opn. below*, 128 A.D.2d 411, 512 N.Y.S.2d 650 (1st Dept. 1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated New York, New York
January 25, 1991

Respectfully submitted,

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